

GARY L. JOHNSON [4353]
ZACHARY E. PETERSON [8502]
RICHARDS, BRANDT, MILLER & NELSON
50 South Main Street, #700
P.O. Box 2465
Salt Lake City, Utah 84110-2465
Telephone: (801) 531-2000
Fax No.: (801) 532-5506

JOHN B. DAUKAS [admitted pro hac vice]
GOODWIN PROCTER LLP
Exchange Place
Boston, MA 02109
Telephone: (617) 570-1000
Fax No.: (617) 523-1231
Attorneys for Defendant Cooley, Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

COVERSTAR, INC., a Utah corporation,

Plaintiff,

vs.

COOLEY, INC., a Rhode Island corporation;
and COOLEY ENGINEERED
MEMBRANES, INC., a Rhode Island
corporation,

Defendants.

**DEFENDANTS' REPLY
MEMORANDUM IN SUPPORT OF ITS
AMENDED MOTION TO STRIKE**

Civil No. 2: 01 CV-0663 S

Pursuant to this Court's request, Defendants Cooley, Inc., a Rhode Island corporation, and Cooley Engineered Membranes, Inc., a Rhode Island corporation (hereinafter "Cooley"), by and through its counsel, Gary L. Johnson and Zachary E. Peterson of the law firm RICHARDS, BRANDT, MILLER & NELSON and John B. Daukas of the law firm GOODWIN PROCTER,

files this Reply Memorandum in Support of its Amended Motion to Strike.

ARGUMENT

Coverstar has supplied this Court with evidence not previously supplied to the Court in its oppositions to Cooley's Motions for Summary Judgment. Cooley's Motion to Strike and Amended Motion to Strike is premised on two points: (1) Coverstar should have provided this evidence in opposing Cooley's motions for summary judgment; and (2) in the event this Court denies Coverstar's Rule 59 motion, Coverstar should not be able to supplement the record for purposes of its already filed appeal.

Coverstar argues its new evidence is merely to demonstrate that it advanced a design defect theory. This Court does not need to examine Coverstar's snippets of testimony and documents submitted without context in order to determine whether Coverstar had a design defect theory. Instead, the Court need only examine Coverstar's Complaint and Third Amended Complaint to determine whether Coverstar asserted a design defect theory. Moreover, this Court should determine whether Coverstar's opposition to Cooley's Motions for Summary Judgment properly argue that its purported design defect theory would preclude entry of summary judgment which disposes of the entire matter.

In submitting previously unidentified "evidence" through post-trial motions which purportedly demonstrates a design defect theory, Coverstar puts Cooley in the untenable situation of either responding as it did that the Coverstar has waived the issue, or in engaging in an evidentiary battle in post-trial motions. Cooley would represent to the Court that evidence from Coverstar's own expert indicates that Coverstar believed the problem resulted from defective

materials (i.e. using polypropylene) and poor construction practices, rather than any design defect. The time to engage in such an evidentiary battle was in opposing Cooley's motions for summary judgment which set forth undisputed facts and supporting legal arguments. Finally, and as argued in Cooley's Memorandum in Opposition to Coverstar's Rule 59 motion and in Cooley's forthcoming Supplemental memorandum, Cooley is entitled to summary judgment regardless of what theory Coverstar attempts to assert.

CONCLUSION

Based on the foregoing, Cooley requests this Court to preclude Coverstar from supplementing its record on appeal by introducing new evidence which it could have, but chose not to raise in a timely manner.

DATED this 25th day of August, 2006.

RICHARDS, BRANDT, MILLER & NELSON

/s/ Zachary E. Peterson
GARY L. JOHNSON
ZACHARY E. PETERSON
Attorneys for Defendants Cooley

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 25, 2006, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which sent notification of such filing to the following:

Evan A. Schmutz, Esq.
Wm. Kelly Nash, Esq.
Hill, Johnson & Schmutz
Jamestown Square
3319 North University Ave. Ste. 200
Provo, UT 84604
Attorneys for Plaintiff

/s/ Zachary E. Peterson

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